No. 80-768

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION, DON VAN BRACKEL, DOROTHY W. CHRISTENSEN, FRED COLLINS, JR., WALTON LOWRY, and HAROLD MORRIS,

Petitioners,

v.

THE COPYRIGHT ROYALTY TRIBUNAL, MARY LOU BURG, Chairman, THOMAS C. BRENNAN, DOUGLAS E. COULTER, CLARENCE L. JAMES, JR., and FRANCES GARCIA, Members,

Respondents.

REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

Page

Cases:

Palmore v. United States, 411 U.S. 389 (1973) 3

PBW Stock Exchange, Inc. v. Securities and Exchange Commission, 485 F.2d 718 (3d Cir. 1973), cert. denied 416 U.S. 969 (1974) 3

Statutes:

The Copyright Act

17 U.S.C. 111 4

17 U.S.C. 115 4

17 U.S.C. 116 . . . . . 2, 3, 4

17 U.S.C. 118 4

17 U.S.C. 801(b) 2, 3, 4

17 U.S.C. 801(b)(1) 2

17 U.S.C. 801(b)(3) 2

17 U.S.C. 810 . . . . . 2, 3, 4

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For the first time in the course of this litigation, the Tribunal, represented by the Solicitor General, takes the position that the court of appeals, not the district court, has exclusive jurisdiction to review the challenged regulations promulgated by the Tribunal.[1]

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[1] At most, the Solicitor General says the court of appeals' interpretation is "permissible," a notably weak expression (Brief in Opposition, beginning page 5.)

Also, in footnote 8 of his brief the Solicitor General extends to 45 days the court of appeals' assertion in footnote 5 of its opinion that petitioners delayed for 37 days in filing their complaint in

[footnote continued]

The Solicitor General contends that 17 U.S.C. 810, which provides for direct review of Tribunal decisions concerning determination of royalty rates pursuant to 17 U.S.C. 801(b)(1) and distribution of royalty fees pursuant to 17 U.S.C. 801(b)(3), also conveys exclusive jurisdiction to the court of appeals to review regulations promulgated by the Tribunal under 17 U.S.C. 116. He predicates his contention upon the argument that sections 116, 801(b)(1), 801(b)(3), and 810 are linked together, but we point out they are linked together only for a purpose that is distinct from the promulgation of regulations, that purpose being to establish the adjudicatory authority of the Tribunal to determine royalty rates and to adjudicate distribution of royalty fees, and to provide for direct appellate review of the Tribunal's final decisions concerning such adjudications, but not concerning the issuance of regulations under 116 which is the issue before the Court.

The Solicitor General overlooks the fact that the rulemaking proceedings under section 116 which are the subject of this litigation are entirely distinct from rate proceedings or fee distribution proceedings and that the latter proceedings are the only proceedings that can result in a final decision under section 801(b), and in direct judicial review proceedings under section 810. Judicial review proceedings under section 810 are therefore limi-

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the district court. Both the Solicitor General and the court of appeals disregard the fact that petitioners had filed with the Tribunal a request for reconsideration of the regulations, and that the Tribunal had the request under consideration, at the time petitioners filed their complaint. There was no time limit on the filing of the request for reconsideration nor on the filing of the complaint in the district court. It clearly is incorrect to say that the complaint was not timely filed.

ted to decisions relating to the distribution of the royalties collected (decisions relating to determination of royalty rates are not in issue in this case); section 810 does not cover the promulgation of regulations relating to the manner in which information concerning the distribution of royalties is obtained, which is the only issue involved in this case.

When section 810 specifies that "Any final decision of the Tribunal in a proceeding under Section 801(b) may be appealed to the United States Court of Appeals," rulemaking proceedings under section 116 are not included. They simply are not mentioned.

It must be presumed that in specifying section 801(b) decisions in section 810, Congress did so with care and that if it had intended to include section 116 regulations it would have said so expressly.

This principle of strict construction is applied to statutes creating an exclusive remedy, and in such cases nothing is to be presumed that it is not given by the statute. In keeping with this principle this Court has accorded strict construction to exclusive statutes that authorize appeals to it.

In *Palmore v. United States,* 411 U.S. 389 (1973), the Court said:

> "Jurisdictional statutes are to be construed 'with precision and fidelity to the terms by which Congress has expressed its wishes.'" (Citations omitted) (p. 1675)

This principle is applied to statutes providing for judicial review of federal agency actions. *PBW Stock Exchange, Inc. v. Securities and Exchange Commission,* 485 F.2d 718 (3d Cir. 1973), cert. denied 416 U.S. 969 (1974).

In the decision below the court of appeals presumed to incorporate section 116 regulations into the Tribunal's powers under Section 801(b) and into the court's special review authority under section 810, even though section 116 was not mentioned in section 810.

We submit that the decision by the court of appeals was plainly erroneous. The Solicitor General says (at page 5 of his brief) that "from now on all parties seeking review *within the District of Columbia Circuit* [emphasis added] will know that regulations of the Tribunal are to be reviewed directly in the court of appeals." That, however, does not relieve the petitioners here from the retroactive effect of the decision, and his statement clearly implies that other courts of appeals can reasonably decide the other way. Moreover, contrary to the Solicitor General's argument that the issue here is a narrow one and that it is not particularly significant, we submit that the decision affects all users and suppliers of music under all the music licensing provisions of the Copyright Act (17 U.S.C. 111, 115, 116 and 118), and also all other litigants who seek judicial review of federal agencies' rulemaking. Indeed, this case presents the Court a great opportunity to clarify the presently muddled law with respect to forums for judicial review.

The decision below should not be allowed to stand.

Respectfully submitted,

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